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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-908

SAUL E. JOFTES, *Petitioner*

v.

WILLIAM A. WEXLER and B'NAI B'RITH, *Respondents*

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR REHEARING

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PETITION FOR REHEARING

Petitioner presents his petition for a rehearing on this Court's order dated March 5, 1973, denying the petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit, and, in support thereof, respectfully shows (all references are to the Appendix to the Petition):

Respondents fired petitioner summarily on January 5, 1968 for having filed a libel suit against the executive

vice-president of their Order. Petitioner accepted the dismissal. Some six weeks later, respondents circulated copies of an unsolicited letter addressed to petitioner in which they charged that, during his employment with B'nai B'rith, he had been guilty of some unidentified mal-, mis- and nonfeasances in discharging the duties of his office. This, until fairly recently, *circa* 1959, would have been considered an unconsented to, and if false, malicious, published libel *per se,* for which the court would make the defamer respond in damages. In older times, a defamatory remark such as this one would ordinarily have been followed by a challenge and a duel but more enlightened minds created trespass on the case as a substitute for swords and pistols and generations of courts had upheld this rule of law that, if without justification a person makes a defamatory statement concerning another person, he is responsible for the damages that he may have caused to that person.

Petitioner, as one of those of us now often looked upon contemptuously by the libertarians because we still cling to many of the ancient verities, believes that a man's reputation—his good name in his community and profession—is a very precious and valuable thing to be fought for and protected or, as Shakespeare has put it: "the immediate jewel of [his] soul", the loss of which "leaves [him] poor indeed". The question is: How shall it be protected?

Once the letter had been circulated, two—and only two—avenues for vindication were open to petitioner. Six weeks earlier his discharge and his acceptance of it had taken away the right he once had had as an employee to file a grievance proceeding. The facts and his acquiescence in the January 5 firing had made a wrongful discharge action a futile thing since he had

indeed filed the libel suit. (See p. 7a where the trial court went so completely wrong on this). Petitioner, thus, could have resorted to self-help which supposedly is frowned upon today or, as he was advised and thought, he could have his vindication in a court of law in the form of damages unless the respondents were able to convince a jury of his peers, after his "day in court", that the charges were true. To his present chagrin, he chose the latter course and filed his suit.

Respondents moved for summary judgment. Petitioner opposed on the ground that genuine issues as to material facts existed even after persistent efforts by petitioner at discovery which the trial court had halted while in process. Petitioner submitted depositions, admissions, interrogatories and affidavits to show that there were genuine issues as to the alleged facts upon which truth of the charges, preparation of the letter and the reason for its issuance as well as the extent and legitimacy of its several publications, malice, privilege and petitioner's employment status and rights as of February 14, 1968 would have to be determined. Confessedly, the trial court does not like libel suits which he characterized as "burdensome, expensive, vexatious" (p. 8a). This is more or less in keeping with a trend sponsored by the late Mr. Justice Black in *Barr* v. *Matteo* (1959) 360 U.S. 564, where, in conformance with his postulate that the First Amendment had abolished the common law action for damages for defamation, he swung an otherwise evenly divided Court to the first step in what has developed into a gradual emasculation of the common law by piecemeal amputation—judge made law. It is only a slight exaggeration to say that the court's decision in the instant case has so abrogated the common law and outlawed the

action for libel in this jurisdiction that we are now close to a completion of the full circle from the code duello to the code duello. How, now, should a conscientious advocate advise the client who has been defamed?

The trial court resolved the very material question of petitioner's employment status by a finding, against all reality, that he still had some sort of status on February 14 and used that finding as the basis for a finding that the February 14 letter had been a notice of dismissal (pp. 4a-5a). He should have left the question of status to the jury. He made an erroneous determination of the material question of why the letter had been issued. He decided the extent and legitimacy of its publications. He made findings on malice and truth (p. 5a, n. 1). While conceding that he knew of no precedent to support him, he held that respondents were operating under an absolute privilege when they circulated the letter because they were firing an employee who had consented to the libel by his membership in the Staff Association (p. 6a-7a). He said he would not "allow" petitioner to proceed with his libel suit and told him that he should have brought an action, whatever it might be, "for an unjust dismissal" (p. 7a.). An illustration of the court's erroneous findings in this case is the one made on the reason for issuing the letter. He said (p. 6a): "President Wexler's letter of February 14, 1968 was written *in response to a demand by Joftes for severance pay* * * *" and (p. 3a): "Joftes shortly thereafter [after January 5] made a written demand upon Joseph Sklover, Comptroller of B'nai B'rith, *for sums claiming to be due him under his contract*" (sic and emphasis added). This finding was basic to his conclusion that respondents were immune to suit for the libel. But in *Joftes* v. *Kaufman*, C.A. No. 768-68 (p. 13a), the same trial judge, after a

trial of the issues, found, as petitioner had contended in the instant case, that petitioner had been fired on January 5, 1968; that he had "demanded *immediate* payment of an amount to cover his right to notice, severance pay, accumulated vacation and return of his contributions to the retirement fund"; that respondent Wexler had determined then that the rights to those sums had *"vested in plaintiff at the time of discharge"* (p. 15a and emphasis added); that Wexler had given "specific instructions" to Sklover to pay petitioner (p. 15a); and that the executive vice-president, in Wexler's absence, had "substantially interfered with [petitioner's] contractual rights" to those sums. In other words, the court found in the instant case that petitioner had waited until January 16 to make his demand upon Sklover for money and that Wexler had responded to this demand with the February 14 letter when, in truth, as the court determined after he had learned all of the facts, the letter to Sklover was only a demand that the Comptroller do what respondent Wexler had ordered him to do on January 5. The court in the instant case should have left to the jury the question of why the February 14 letter had been written. Attention is called to the less than frank manner in which respondents dealt with the question on page 5 of their brief by leaving out any mention of the order Wexler had given Sklover on January 5.

The court found as a fact (p. 5a) that "each of the documents at issue [the February 14 letter] were (sic) contemplated by the collective bargaining agreement". Petitioner had disputed this on the ground that the January 5 letter and not the February 14 letter was the dismissal notice. The trial court should have left this question to the jury.

Petitioner specifically bases his request for rehearing and the issuance of the writ on two grounds:

1. There were genuine issues as to material facts and the trial court erred in making a "finding of fact" and in granting respondents' motions for summary judgment.

2. Petitioner calls upon the Court to grant the writ as an announcement that the trend toward nullification by judges of the common law on libel has been ended with a reaffirmation of the concepts of due process and fairness.

BYRON N. SCOTT
Attorney for Petitioner.

Certificate by Counsel

I, Byron N. Scott, counsel for the above-named petitioner, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Rule 58, subdivision 2, of the Rules of this Court.

BYRON N. SCOTT
Attorney for Petitioner.

I certify that prior to the filing of this petition, I have mailed a copy of it to Edward D. Friedman, Esq., attorney for respondents at his office in the District of Columbia.

BYRON N. SCOTT